

Jul 25, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TOMMY J.¹,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

No. 4:17-CV-05098-EFS

**ORDER RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT**

CLERK'S OFFICE ACTION REQUIRED

Before the Court are the parties' cross motions for summary judgment, ECF Nos. 12 & 13. Plaintiff Tommy J. appeals a denial of benefits by the Administrative Law Judge (ALJ). He alleges the ALJ erred by (1) improperly rejecting the opinions of his medical providers; (2) rejecting his subjective complaints; (3) finding he did not meet a listing; and (4) failing to meet her step-five burden. ECF No. 12 at 8. The Commissioner of Social Security (Commissioner) asks the Court to affirm the ALJ's decision finding Plaintiff not disabled. ECF No. 13.

After reviewing the record and relevant authority, the Court is fully informed. For the reasons set forth below, the Court grants in part and denies in part Plaintiff's Motion for Summary Judgment, grants

¹ To protect the privacy of social-security plaintiffs, the Court refers to them by first name and last initial. See proposed draft of LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Plaintiff" for any other identifier that was used.

1 in part and denies in part Defendant's Motion for Summary Judgment,
2 enters judgment for Plaintiff, and remands this matter to the ALJ for
3 additional proceedings.

I. Factual and Procedural Summary²

5 Plaintiff was born on November 5, 1971, and is 46 years old.
6 Administrative Record (AR) 145. At the time of the hearing, he lived
7 with his 16-year old son. AR 44. He suffers from curvature of the spine,
8 osteoarthritis, affective disorder, and anxiety disorder as well as a
9 knee injury related to a prior gunshot wound. AR 22, 48. Plaintiff
10 completed one year of college, where he studied auto-body technology.
11 AR 68-69. Plaintiff has a criminal history and was incarcerated from
12 2000 to 2011 for first degree armed robbery. AR 46, 64. Plaintiff worked
13 briefly at the end of 2011 but has not worked since then. AR 45-47.

14 Plaintiff filed an application for Supplemental Security Income
15 (SSI) on October 15, 2013, alleging disability beginning on September 6,
16 2013. AR 145-53. His claim was denied initially and upon
17 reconsideration. A hearing was held on January 13, 2016, before
18 Administrative Law Judge Virginia M. Robinson. AR 20-30. The ALJ issued
19 an unfavorable decision on February 16, 2016. AR 17-19. The Appeals
20 Council denied Plaintiff's request for review, AR 1-6, and he timely
21 appealed to this Court. ECF No. 1.

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25 ² The facts are only briefly summarized. Detailed facts are contained
26 in the administrative hearing transcript, the ALJ's decision, the
 parties' briefs, and the underlying records.

II. Disability Determination

2 A claimant is considered "disabled" for the purposes of the Social
3 Security Act if two conditions are satisfied. First, the claimant must
4 be "unable to engage in any substantial gainful activity by reason of
5 any medically determinable physical or mental impairment which can be
6 expected to result in death or which has lasted or can be expected to
7 last for a continuous period of not less than twelve months." 42 U.S.C.
8 § 1382c(a)(3)(A). Second, the claimant's impairment must be of such
9 severity that he "is not only unable to do his previous work but cannot,
10 considering his age, education, and work experience, engage in any
11 other kind of substantial gainful work which exists in the national
12 economy." *Id.* § 1382c(a)(3)(B). The decision-maker uses a five-step
13 sequential evaluation process to determine whether a claimant is
14 disabled. 20 C.F.R. §§ 404.1520, 416.920.

Step one assesses whether the claimant is currently engaged in a substantial gainful activity. *Id.* § 416.920(a)(4)(i). If he is, benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the decision-maker proceeds to step two.

19 Step two assesses whether the claimant has a medically severe
20 impairment or combination of impairments that significantly limit the
21 claimant's physical or mental ability to do basic work activities. 20
22 C.F.R. §§ 404.1520(c), 416.920(c). If he does not, the disability claim
23 is denied. If he does, the evaluation proceeds to step three.

24 Step three compares the claimant's impairment to several
25 impairments recognized by the Commissioner to be so severe as to
26 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404

1 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of
2 the listed impairments, the claimant is conclusively presumed to be
3 disabled. If the impairment does not, the evaluation proceeds to step
4 four.

5 Step four assesses whether the impairment prevents the claimant
6 from performing work he has performed in the past by determining the
7 claimant's residual functional capacity ("RFC"). *Id.* §§ 404.1520(e),
8 416.920(e). If the claimant is able to perform his previous work, the
9 claimant is not disabled. If the claimant cannot perform this work,
10 the evaluation proceeds to step five.

11 Step five, the final step, assesses whether the claimant can
12 perform other work in the national economy in view of the claimant's
13 age, education, and work experience. 20 C.F.R. §§ 404.1520(f),
14 416.920(f); *see Bowen v. Yuckert*, 482 U.S. 137 (1987). If he can, the
15 disability claim is denied. If he cannot, the claim is granted.
16 The burden of proof shifts during this analysis. The claimant has the
17 initial burden of establishing entitlement to disability benefits under
18 steps one through four. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
19 1971). At step five, the burden shifts to the Commissioner to show (1)
20 that the claimant can perform other substantial gainful activity and
21 (2) that a "significant number of jobs exist in the national economy"
22 that the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
23 (9th Cir. 1984).

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III. ALJ Findings

At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful activity since October 15, 2013, the application date. AR 22.

At step two, the ALJ concluded that Plaintiff had the following medically determinable severe impairments: curvature of spine, osteoarthritis and allied disorders, affective disorder, and anxiety disorder. *Id.*

At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. *Id.* at 22-24.

At step four, the ALJ found that Plaintiff had the residual functional capacity to perform sedentary work as defined in 20 C.F.R. § 416.967(a) except for the following limitations: Plaintiff can lift or carry up to 10 pounds occasionally; stand or walk for approximately 2 hours and sit for approximately 6 hours per 8 hour work day with normal breaks; occasionally climb ramps or stairs but never climb ladders, ropes, or scaffolds; frequently balance, occasionally stoop, kneel, crouch, and crawl; requires a handheld assistive device for prolonged ambulation or ambulating on uneven terrain; avoid concentrate exposure to extreme cold, excessive vibration and workplace hazards such as dangerous machinery, and cannot work at unprotected heights; perform simple, routine tasks in a routine job work environment, with only superficial interaction with coworkers and only incidental interaction with the public. AR 24. In reaching this conclusion, the ALJ found that Plaintiff's medically determinable impairments could

1 reasonably be expected to cause the alleged symptoms, but she found
2 that some of Plaintiff's statements concerning the intensity,
3 persistence and limiting effects were not entirely credible. *Id.* at
4 25.

5 In determining Plaintiff's RFC, the ALJ gave little weight to the
6 opinion of Dr. Mark Merrell; partial weight to the opinions of Dr. Hazel
7 Gavino, the DSHS psychological examiner, and therapist Marlena Workman;
8 some weight to the opinion of Jared Holman, ARNP; and significant weight
9 to the opinions of State agency physician Dr. Normal Staley and State
10 agency psychologist Dr. Diane Fligstein. AR 28-29.

11 At step five, the ALJ found Plaintiff had no past relevant work
12 and that there are jobs that exist in significant numbers in the
13 national economy that Plaintiff could perform. AR 29-30.

14 **IV. Standard of Review**

15 A district court's review of the Commissioner's final decision is
16 governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
17 limited: the Commissioner's decision will be disturbed "only if it is
18 not supported by substantial evidence or is based on legal error." *Hill*
19 *v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). Substantial evidence is
20 "more than a mere scintilla but less than a preponderance; it is such
21 relevant evidence as a reasonable mind might accept as adequate to
22 support a conclusion." *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir.
23 2012) (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

24 It is the role of the ALJ, not this Court, to weigh conflicting
25 evidence and make credibility assessments. If the evidence in the record
26 "is susceptible to more than one rational interpretation, [the court]

1 must uphold the ALJ's findings if they are supported by inferences
2 reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111
3 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's
4 decision on account of an error that is harmless." *Id.* An error is
5 harmless "where it is inconsequential to the [ALJ's] ultimate
6 nondisability determination." *Id.* at 1115 (quotation and citation
7 omitted). The party appealing the ALJ's decision generally bears the
8 burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
9 396, 409-10 (2009).

10 **V. Discussion**

11 **A. Although the ALJ correctly weighed Dr. Merrell's medical opinion,
she improperly rejected Dr. Gavino's medical opinion.**

12
13 Plaintiff argues that the ALJ failed to adequately consider the
14 opinions of treating physicians Dr. Hazel Gavino and Mark Merrell. ECF
15 No. 12 at 10.

16 There are three types of physicians: "(1) those who treat the
17 claimant (treating physicians); (2) those who examine but do not treat
18 the claimant (examining physicians); and (3) those who neither examine
19 nor treat the claimant [but who review the claimant's file] (non-
20 examining physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02
21 (9th Cir. 2001). Generally, a treating physician's opinion carries more
22 weight than an examining physician's, and an examining physician's
23 opinion carries more weight than a non-examining physician's. *Id.* at
24 1202. "In addition, the regulations give more weight to opinions that
25 are explained than to those that are not, and to the opinions of
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1 specialists concerning matters relating to their specialty over that of
2 nonspecialists." *Id.*

3 If a treating or examining physician's opinion is uncontradicted,
4 the ALJ may reject it only by offering "clear and convincing reasons
5 that are supported by substantial evidence." *Bayliss v. Barnhart*, 427
6 F.3d 1211, 1216 (9th Cir. 2005). However, the "ALJ need not accept the
7 opinion of any physician, including a treating physician, if that
8 opinion is brief, conclusory and inadequately supported by clinical
9 findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th
10 Cir. 2009) (citation omitted). "If a treating or examining doctor's
11 opinion is contradicted by another doctor's opinion, an ALJ may only
12 reject it by providing specific and legitimate reasons that are
13 supported by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing
14 *Lester*, 81 F.3d 821, 830-31).

15 1. Dr. Gavino

16 On January 15, 2016, in response to two work-related questions in
17 a written evaluation, treating physician Dr. Hazel Gavino opined that
18 Plaintiff had the following limitations: "no prolonged standing,
19 sitting, bending, kneeling, crawling, lifting heavy weights, unable to
20 use transportation effectively on time" and that he would miss four or
21 more days of work per month because of his chronic left knee and back
22 pain. AR 372-73. Dr. Gavino also opined that Plaintiff's pain requires
23 him to lie down three to four hours a day. AR 372.

24 The ALJ gave Dr. Gavino's opinion partial weight. AR 28. She agreed
25 that Plaintiff "does have some reasonable limits on prolonged standing,
26 lifting heavy weights, twisting, kneeling and such," but she also noted

1 that "he is able to drive, perform regular activities of daily living,
2 and was performing work as [a] custodian." *Id.* Thus, she concluded "it
3 is more reasonable that he could work at a less than the full range of
4 sedentary work." *Id.*

5 Plaintiff argues that the ALJ may not rely on his daily activities
6 to reject Dr. Gavino's opinion and that even his part-time custodial
7 work made him feel "depressed and exhausted" and exacerbated his knee
8 pain. ECF No. 12 at 11. The Commissioner responds that Dr. Gavino's
9 opinion does not constitute "significant probative evidence" that must
10 be discussed by the ALJ because her opinion that Plaintiff could not
11 sustain "prolonged" standing or sitting does "specify an actual
12 quantitative work related limitations" for the ALJ to assess. ECF No. 13
13 at 15. The Commissioner further argues that even so, the record
14 demonstrates that Plaintiff had the ability to work at a less than full
15 range of sedentary work, and the ALJ properly discredited Dr. Gavino's
16 opinion. *Id.*

17 The ALJ did not list sufficiently clear and convincing reasons to
18 discredit Dr. Gavino's opinion. A naked reference to Plaintiff's daily
19 living activities, without specifically naming an activity and why it
20 contradicted Dr. Gavino's conclusions, is not an appropriate reason to
21 reject a treating physician's opinion. *See Garrison v. Colvin*, 759 F.3d
22 995, 1041 (explaining that ALJs frequently and improperly rely on daily
23 living activities to reject medical opinions). Similarly, the ALJ's
24 mention of Plaintiff's part-time custodial work does not constitute a
25 clear and convincing reason to reject Dr. Gavino's opinion. The ALJ did
26 not explain how part-time work at an unknown exertional level for an

1 unknown number of hours contradicted Dr. Gavino's specific conclusions
2 that Plaintiff has to lie down three to four hours a day and would miss
3 four or more days of work per month because of his chronic knee and
4 back pain. AR 372-73. Nor did she identify any medical opinions or any
5 other record evidence that contradicts Dr. Gavino's opinion.

6 Because the ALJ's reasons for rejecting Dr. Gavino's opinion are
7 not clear and convincing, she erred by giving the opinion partial
8 weight.

9 2. Dr. Merrell

10 On January 4, 2016, treating physician Dr. Mark Merrell opined
11 that Plaintiff "continues to be significantly disabled" and that further
12 surgery was required to stabilize his patella. AR 374. The ALJ gave this
13 opinion "little weight" because Dr. Merrell failed "to offer adequate
14 explanation and objective evidence as to the claimant's particular
15 functional limitations" and because "a determination of disability is
16 reserved for the Commissioner." AR 28.

17 Plaintiff argues that the ALJ incorrectly characterized
18 Dr. Merrell's opinion as unexplained and that she ignored his statement
19 that Plaintiff "is significantly limited because he has to elevate his
20 leg 2-3 hours a day because of intermittent swelling." ECF No. 12 at
21 11-12. However, Dr. Merrell made this statement more than 14 months
22 prior, at an appointment on October 13, 2014. AR 257. Thus, it has
23 little bearing on his opinion given January 4, 2016. Dr. Merrell's
24 opinion that Plaintiff was "significantly disabled" remains "brief,
25 conclusory, and inadequately supported by clinical findings"; thus, it
26 was properly rejected by the ALJ. *Bray*, 554 F.3d at 1228.

1 **B. The ALJ did not error in weighing other source testimony.**

2 Plaintiff also argues that the ALJ failed to adequately consider
3 the opinion of treating therapist Marlena Workman. ECF No. 12 at 10.

4 An ALJ may consider "other source" testimony from sources such as
5 nurse practitioners, physicians' assistants, and counselors. 20 C.F.R.
6 § 404.1513(d). Such testimony regarding a claimant's symptoms or how an
7 impairment affects his or her ability to work is competent evidence,
8 and cannot be disregarded without comment. *Dodrill v. Shalala*, 13 F.3d
9 915, 918-19 (9th Cir. 1993). If an ALJ chooses to discount testimony of
10 a lay witness, the ALJ must provide "reasons that are germane to each
11 witness" and may not simply categorically discredit the testimony. *Id.*
12 at 919.

13 1. Therapist Workman

14 On October 9, 2014, therapist Marlena Workman filled out a checkbox
15 assessment of Plaintiff. AR 249-52. In doing so, she indicated Plaintiff
16 exhibited moderate and marked mental limitations and that he would miss
17 four or more work days per month. *Id.* The ALJ gave this opinion partial
18 weight for two reasons: (1) Therapist Workman is not an acceptable
19 medical provider; and her opinion on Plaintiff's limited social function
20 is unsupported by the record, which shows he had "no difficulties
21 interacting with his providers, functioning outside his home, seeking
22 and accepting work, and working with the division of vocational
23 rehabilitation." AR 28.

24 As a preliminary matter, an ALJ "may permissibly reject check-off
25 reports that do not contain any explanation of the bases of their
26 conclusions." *Molina*, 674 F.3d at 1111. Such an opinion - unexplained,

1 as it is here - is, by its very nature, brief and conclusory. Thus, the
2 ALJ properly rejected it. See *Bray*, 554 F.3d at 1228. Moreover,
3 Plaintiff's complaints with the ALJ's second reason for rejecting
4 Therapist Workman's opinion are more akin to an interpretive
5 disagreement than an allegation of error. Accordingly, the ALJ did not
6 err by rejecting Therapist Workman's opinion.

7 **C. The ALJ did not err by rejecting Plaintiff's subjective symptom
8 complaints.**

9 Plaintiff also argues the ALJ erred by improperly rejecting his
10 subjective symptom complaints. ECF No. 12 at 14-18.

11 The ALJ engages in a two-step analysis to determine whether a
12 claimant's testimony regarding subjective pain or symptoms is credible.
13 "First, the ALJ must determine whether there is objective medical
14 evidence of an underlying impairment which could reasonably be expected
15 to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at
16 1112. Second, "[i]f the claimant meets the first test and there is no
17 evidence of malingering, the ALJ can only reject the claimant's
18 testimony about the severity of the symptoms if [the ALJ] gives
19 'specific, clear and convincing reasons' for the rejection." *Ghanim v.*
20 *Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter v.*
21 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). An ALJ must make
22 sufficiently specific findings "to permit the court to conclude that
23 the ALJ did not arbitrarily discredit [the] claimant's testimony."
24 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations
25 omitted). General findings are insufficient. *Lester*, 81 F.3d at 834.

1 Courts may not second-guess ALJ findings that are supported by
2 substantial evidence. *Id.*

3 In making an adverse credibility determination, an ALJ may
4 consider, among other things, (1) the claimant's reputation for
5 truthfulness; (2) inconsistencies in the claimant's testimony or between
6 his testimony and his conduct; (3) the claimant's daily living
7 activities; (4) the claimant's work record; and (5) the nature,
8 severity, and effect of the claimant's condition. *Thomas v. Barnhart*,
9 278 F.3d 947, 958-59 (9th Cir. 2002).

10 Plaintiff alleged disability due to his impairments. He contended
11 that his symptoms affect his ability to lift, squat, bend, stand, reach,
12 walk, sit, kneel, climb stairs, complete tasks, concentrate, and get
13 along with others. AR 24. At the hearing, Plaintiff testified that he
14 cannot stand for five to ten minutes due to pain and that he can only
15 walk a block before his knee gets painful. He testified to difficulty
16 walking on uneven terrain and that his knee sometimes gives out. He
17 further testified to using a cane and needing to elevate his leg two to
18 three hours a day. He also alleged that he suffered from neck and back
19 pain as well as PTSD with nightmare, flashbacks, and insomnia. AR 27.

20 The ALJ found that Plaintiff's medically determinable impairments
21 could reasonably be expected to cause the alleged symptoms but that his
22 statements concerning the intensity, persistence, and limiting effects
23 of the symptoms was not entirely credible. AR 25. The ALJ provided a
24 number of reasons for discounting Plaintiff's symptom testimony,
25 including the following: (1) the record indicates his spine pain was
adequately controlled during the relevant period; (2) medical records

1 conflict with his testimony regarding knee pain and functionality;
2 (3) he was engaging in part-time custodial work during the relevant
3 period and repeatedly reported in therapy that he was seeking work; and
4 (4) his urine drug screens were not positive for opiates, which he was
5 prescribed, but were positive for marijuana, which he denied using.
6 AR 27-28.

7 First, the ALJ found that Plaintiff's complaints regarding his
8 spine pain were inconsistent with the medical evidence. See *Rollins v.*
9 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (explaining that medical
10 evidence is a relevant factor in determining the severity of the
11 claimant's pain and its disabling effects). Indeed, despite Plaintiff's
12 complaints of disabling spine pain, the record indicates he was not
13 taking his prescribed opiate pain medication, AR 233-34, nor is there
14 evidence that he followed up on his provider's recommendation that he
15 seek chiropractic or injection therapy. AR 241-243. When Plaintiff did
16 take his prescribed pain medication, however, that treatment was
17 effective. See *Molina*, 674 F.3d at 1113 ("We have long held that, in
18 assessing a claimant's credibility, the ALJ may properly rely on
19 unexplained or inadequately explained failure to seek treatment or to
20 follow a prescribed course of treatment") (internal quotations omitted).

21 The ALJ noted that Plaintiff's treatment records regarding his
22 knee pain are similarly inconsistent with his testimony. This conclusion
23 was supported by substantial evidence in the record. The ALJ correctly
24 noted that after Plaintiff's knee replacement, he reported significant
25 improvement. An exam by Eric Lowe, PA-C on May 21, 2015, revealed only
26 "mild swelling and a bit of discomfort in his knee." AR 259. Contrary

1 to his testimony that he could only walk a block at a time, AR 51-52,
2 he had a tandem gait, smooth coordinated movements to the extremities,
3 showed no weakness, and had full extension and flexion to greater than
4 130 degrees with no joint instability or tenderness to the patellar or
5 quadriceps tendons. AR 259.

6 Third, The ALJ discredited Plaintiff's subjective symptom
7 complaints by noting that he engaged in part-time custodial work during
8 the period of alleged disability. AR 27. This conclusion was supported
9 by substantial evidence. Not only was Plaintiff successfully completing
10 part-time work in September 2015, he complained to Therapist Workman
11 that was having difficulty finding full-time work because of "the
12 stipulations for my SSI." AR 318. He further expressed interest in
13 "going back to school at CBC and possibly finding a job on campus" and
14 reported that he was "planning and organizing his own small business"
15 AR 313, 318. The ALJ correctly pointed out that these statements suggest
16 a secondary gain motivation and discredited his testimony. AR 27-28.

17 Finally, the ALJ noted that Plaintiff's drug screens were not
18 positive for opiates, indicating a lack of compliance with treatment
19 plans. AR 28. Notably, although Plaintiff stated to his medical
20 providers that he did not use marijuana, AR 352, 356, multiple urine
21 drug tests came back positive for marijuana metabolites. See AR 229-
22 230, 233-34. "Contradiction with the medical record is a sufficient
23 basis for rejecting the claimant's subjective testimony." *Carmickle v.*
24 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (citing
25 *Johnson v. Shalala*, 50 F.3d 1428, 1434 (9th Cir. 1995)).

26

1 Accordingly, the ALJ did not err by rejecting Plaintiff's
2 subjective symptom testimony.

3 **D. The ALJ did not err by finding Plaintiff did not meet a listing.**

4 Plaintiff argues the ALJ erred by finding Plaintiff did not meet
5 Listing 1.02 - Major Dysfunction of a Joint. ECF No. 12 at 18-19.

6 At step three, the ALJ determines if a claimant's impairment meets
7 or equals an impairment listed in Appendix 1 to Subpart P of Regulations
8 No. 4. The Listing of Impairments describes specific impairments of each
9 of the major body systems "which are considered severe enough to prevent
10 a person from doing any gainful activity." See 20 C.F.R. § 404.1525. If
11 a claimant meets or equals a listed impairment he or she will be found
12 disabled at this step without further inquiry. See 20 C.F.R.
13 § 404.1520(d).

14 Plaintiff claims that he meets or equals Listed Impairment 1.02,
15 which is "major dysfunction of a joint." To meet or equal this
16 impairment, Plaintiff was required to demonstrate he had an "inability
17 to ambulate effectively," which is defined as "having insufficient lower
18 extremity function" to "permit independent ambulation without the use
19 of a hand-held assistive device(s) *that limits the functioning of both*
20 *upper extremities.*" 20 C.F.R. § Pt. 404, Subpt. P, App. 1 (emphasis
21 added). Although Plaintiff testified that he relies on a cane, which is
22 a hand-held device that limits the functioning of one upper extremity,
23 there is no evidence in the record that he ever utilized or required
24 the use of a walker or other hand-held assistive device that limited
25 the functioning of both upper extremities. Accordingly, the ALJ's
26

1 finding that Plaintiff did not meet listing 1.02 was supported by
2 substantial evidence. AR 22.

3 **E. The Court declines to rule on the step-five issue.**

4 At step five, the Commissioner has the burden to "identify specific
5 jobs existing in substantial numbers in the national economy that
6 claimant can perform despite her identified limitations. *Johnson v.*
7 *Shalala*, 50 F.3d 1428, 1432 (9th Cir. 1995); see also 20 C.F.R.
8 § 416.920(g). At an administrative hearing, an ALJ may solicit
9 vocational expert (VE) testimony as to the availability of jobs in the
10 national economy. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999).
11 A VE's testimony may constitute substantial evidence of the number of
12 jobs that exist in the national economy. *Bayliss*, 427 F.3d at 1218. The
13 ALJ's decision regarding the number of alternative occupations must be
14 supported by substantial evidence. *Farias v. Colvin*, 519 F. App'x 439,
15 440 (9th Cir. 2013).

16 Here, the VE testified that Plaintiff could perform the following
17 occupations: escort vehicle driver (DOT #919.663-022), sedentary, SVP-
18 2, with 200,000 jobs nationally and 3,000 in Washington; document
19 preparer (DOT #249.587-018), sedentary, SVP-2, with 100,000 jobs
20 nationally and 2,000 in Washington; and assembler (DOT #734.687-018),
21 sedentary, SVP-2, with 250,000 jobs nationally and 5,000 in Washington.

22 Plaintiff argues that the ALJ's hypothetical failed to take into
23 account the limitations set forth by Plaintiff's medical providers.
24 Because the Court reverses and remands for the ALJ to reconsider
25 Dr. Gavino's opinion, the Court declines to address this issue. Should
26

the ALJ deem it appropriate to consult a VE on remand, she should do so.

VI. Conclusion

The Court is troubled by Plaintiff's statement that he was not working full-time because of "the stipulations for [his] SSI" and agrees that it suggests a secondary gain motivation. AR 27-28, 318. However, the ALJ's rejection of Dr. Gavino's opinion was legally insufficient. Thus, for the reasons discussed above, the Court reverses the ALJ's decision and remands for the ALJ to reconsider Dr. Gavino's opinion and conduct any additional proceedings, including further development of the record, as she sees fit.

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is
GRANTED IN PART AND DENIED IN PART.

2. The Commissioner's Motion for Summary Judgment, ECF No. 13, is GRANTED IN PART AND DENIED IN PART.

3. The Clerk's Office shall enter **JUDGMENT** for Plaintiff.

4. The case shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to file this Order, enter Judgment for Plaintiff, provide copies to all counsel, and close the file.

DATED this 23rd day of July 2018.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge